No. 8428

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United States
Circuit Court of Appeals
For the Ninth Circuit

FIDELITY and DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellant,

vs.

THE STATE OF MONTANA and THE DEPARTMENT OF AGRICULTURE, LABOR AND INDUSTRY THEREOF, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of CHATTERTON and SON, a corporation, at Billings,

Appellees.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Montana.

T. B. WEIR,
W. L. CLIFT,
HARRY P. BENNETT,
Helena, Montana,
Attorneys for Appellant.

Filed ..... MAR 30 1937 ....., 1937.

.....Clerk.

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I. JURISDICTION.

In this action the complaint was originally filed in the District Court of Yellowstone County, in and for the State of Montana, on May 11th, 1932. The suit was an action at law on a public warehouseman's bond to the State of Montana, (Tr. pages 3-21). The complaint prayed for judgment in the sum of Twenty Thousand Dollars ($20,000.00), although the bond, a true copy of which was attached to said complaint, marked Exhibit "A", (Tr. 13-15), is in the principal sum of Ten Thousand Dollars ($10,000.00). On June 1st, 1932, appellant herein duly served

and filed a petition for removal of this cause from said State Court to the United States District Court for the District of Montana on the grounds of diversity of citizenship and the sum of money in controversy, as follows:

(a) That the plaintiffs were residents of Montana in that the said State of Montana and the Department of Agriculture thereof were suing on behalf and in the interest of residents of said State of Montana against this appellant, a corporation incorporated under the laws of the State of Maryland and a non-resident of Montana.

(b) That the matter and amount in dispute in said action, exclusive of interest and costs, exceeded Three Thousand Dollars ($3,000.00), all pursuant to Title 28, Section 41, U.S.C.A. (36 Stat. 1091). Notice, petition and bond on removal shown at pages 23-26 of Transcript.

On June 1st, 1932, the State Court duly made and entered its order removing said case to the United States District Court for the District of Monana and Transcript of Record with Certificate of Clerk was duly filed in said United States District Court on June 8th, 1932, (Tr. 31-32).

Exceptions were taken to orders of the lower Court allowing the filing of an amended complaint by appellee and the order of said Court allowing appellee's motion to strike affirmative defenses of appellant's answer by separate Bill of Exceptions duly filed, settled and allowed, (Tr. 76-78) (Tr. 107-111).

After trial the decision of lower Court in favor of appellee was rendered and filed on the 10th day of September, 1936, (Tr. 114-124) and final judgment thereon duly made, filed and entered September 19th, 1936, (Tr. 125-126).

The jurisdiction of this Court is invoked under Judicial Code Section 128 (a) as amended February 13th, 1925, effective May 13th, 1925, (43 Stat. L. 936, 28 U.S.C.A., Sec. 225).

II. STATEMENT OF CASE.

For many years prior thereto, and during the years 1929 and 1930, Chatterton & Son, a Michigan corporation with principal place of business at Lansing, Michigan, were engaged extensively over the United States in the general elevator and warehouse business. They handled hay, grain, beans, seeds, building material and supplies, coal (Tr. 198) and occasionally other commodities (Tr. 200, line 4). At first the principal part of the business was grain, but later the handling of beans grew to be the greater part of the business of said corporation.

In August, 1929, said Chatterton & Son opened a branch warehouse in Billings, Montana, with one R. J. Healow as their local manager. At this Billings Branch they handled beans. In December, 1929, Chatterton & Son, by written application signed by H. E. Chatterton, the President, and A. H. Madsen, Secretary of said company, at Lansing, Michigan, made application to the appellant herein, Fidelity and Deposit Company of Maryland, for a "Public Warehouseman's Bond" to the State of Montana in the sum of $10,000.00 (Tr. 95-102).

The application was made through appellant's agency, Dyer-Jenison-Barry Company, of Lansing, Michigan, and pursuant thereto, on January 7th, 1930, a bond was executed to the State of Montana to qualify Chatterton & Son under the laws of the State to do business as licensed pub-

lic warehousemen in the storage and handling of grain, which bond provided:

> "The condition of this obligation is such that, whereas the above bounden Chatterton & Son, being the lessee of a public local warehouse located at Billings, in the State of Montana, and owned, controlled or operated by the said Chatterton & Son, *has applied to the Division of Grain Standards and Marketing of the Department of Agriculture, Labor and Industry, of the State of Montana, for a license or licenses to open, conduct and carry on the business of public warehouseman in the State of Montana* for the period *beginning January 1st, 1930*, and ending July 1st, 1930, in *accordance with the laws* of the State of Montana * * * * *
>
> NOW, THEREFORE, if the said Chatterton & Son shall indemnify the owners of *grain stored* in said warehouse against loss and faithfully perform all the duties of and as a public warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture hereto ***** then this obligation to be null and void, otherwise to remain in full force and effect." (Italics ours).

The bond covered the period from January 1st, 1930, to July 1st, 1930 (Tr. 13-15).

The bond was received by R. J. Healow, Manager for Chatterton & Son at Billings, Montana, in January, 1930, but was kept in his files some sixteen months, and never delivered to the Department of Agriculture of Montana until after its term had expired, and after the trouble over Chatterton's affairs had started, to-wit, May 12th, 1931, (Tr. 162, Ex. 8).

In the interim, and on July 10th, 1930, a certificate con-

tinuing said original bond in force from July 1st, 1930, to July 1st, 1931, was executed by appellant and, in turn, came into Agent Healow's possession in July, 1930, (Tr. 132, line 1-11). This was kept in Healow's files in Billings for a year and was not transmitted to the Department of Agriculture until after it, by its terms, had expired, to-wit, July 21st, 1931, (Tr. 176, Ex. 16). It is admitted that, prior to said date of transmittal of said continuation certificate, on July 2nd, 1931, Healow had been relieved of his management of the Billings branch, (Tr. 139, Par. 2), and the beans all shipped out of the warehouse by July 13th, 1931, (Tr. 18-19), on which date the warehouse was closed and Chatterton & Son ceased doing business.

At this time there was in Montana, statutes covering grain warehousemen and providing for the licensing, bonding and supervision of such warehouses dealing in grain, through the division of "Grain Standards and Marketing" of the Department of Agriculture, Labor and Industry of Montana, and giving the said Department of Agriculture the right to sue on said bonds "or do any and all things lawful or needful" for the benefit of holders of warehouse receipts. (Secs. 3574-3592, Revised Codes of Montana, 1921, as amended, pages .1. to .6. Appendix).

There was also a similar act passed as Chapter 50 of the Session Laws of Montana, 1927, which provided for the licensing and bonding of warehousemen dealing in "agricultural seeds", but which failed to have any provision relating to the intervention of the State of Montana through its Department of Agriculture, as did said grain warehousemen's Acts (Sections 3592.1—3592.9, Revised Codes

of Montana, 1921 and 1935, set forth at pages .6. to .9. Appendix).

That neither said bond nor renewal thereof was ever approved or filed with the State of Montana, nor the Department of Agriculture, Labor and Industry thereof, or came into their possession prior to Agent Healow's finding and subsequent mailing, as set forth supra is conceded (Tr. 132).

It is also an admitted fact that no application was ever made by Chatterton & Son for a license to conduct said business in the State, nor was any license ever issued by the State of Montana, nor any Department thereof, to said Chatterton & Son to engage in business as warehousemen, as provided under the Statutes and laws of the State of Montana, nor for any other purpose at all.

By July 13, 1931, the warehouse at Billings was emptied, the warehouse closed and Chatterton & Son ceased to do business.

Thereafter, the Commissioner of Agriculture of the State of Montana made demand on appellant for the penal sum of the bond, which was refused, and on May 11th, 1932, this action was commenced in the State District Court of Yellowstone County, at Billings, Montana.

This action to recover on said bond, brought originally in said State Court (Tr. 2) was, June 1st, 1932, removed to the Federal District Court for the District of Montana, Billings, Montana. Thereafter, on March 9th, 1933, defendant filed its answer, among other things asserting affirmatively that warehousemen, Chatterton & Son, had never been licensed, had never filed said bond with the

State of Montana, and further, that the bond sued upon was a grain bond and did not cover beans, for which recovery was sought.

On March 23rd, 1933, plaintiff filed its reply in the form of a general denial and the case was at issue.

Thereafter, on December 10th, 1934, plaintiff filed a motion for leave to file an amended complaint (Tr. 48-49) in equity—abandoning its former action based on the statutory bond and remedies provided under the Codes of Montana. The new complaint asked for the equitable relief of reformation, i.e., to reform the bond from one covering "grain" to cover "beans" and seeking recovery therein as a common law obligation.

Appellant filed written objections to the filing of said amended complaint on the grounds that (a) said proposed amended bill of complaint set up a new, separate and independent cause from a straight statutory action at law, to one in equity for reformation on grounds of mutual mistake, and recovery on reformed instrument as a common-law-bond. (b) That said new cause of action for reformation was barred by Sections 9032 and 9033, Revised Codes of Montana, and Section 4 of Section 9033, prescribing that an action for relief on grounds of mistake must be brought within two years after discovery of facts constituting mistake; that said application was not timely and appellee guilty of laches (Tr. 50-51).

After hearing, by a decision of lower Court of March 4th, 1935, (Tr. 52) Appellant's objections were overruled and filing of amended complaint allowed, to which action

of Court proper exception was taken and preserved by Bill of Exceptions, settled and allowed, (Tr. 72).

Appellant thereafter filed a motion to dismiss said complaint on the above grounds and, in addition, that amended complaint failed to state a cause of action and there was a defect of parties in that plaintiff failed to make Chatterton & Son, principal obligor on the bond, a party plaintiff or defendant in said action for reformation (Tr. 67-70).

Said motion to dismiss was denied on June 17th, 1935, and Appellant's answer to said amended complaint was filed on July 1st, 1935, (Tr. 78).

Appellees thereafter filed a motion to strike all of the affirmative defenses in said answer contained (Tr. 102-103), which motion was granted by order of Court of December 30th, 1935, to which ruling of the Court exception was taken and preserved by Bill of Exceptions, settled and allowed, (Tr. 111).

Thereafter said case was tried to the Court without a jury, resulting in a decision of the lower Court reforming said bond and finding the issues against Appellant herein. Pursuant to said decision, judgment was entered in said action on September 19th, 1936, for the sum of $13,100.00, with interest from July 15th, 1931, at 6%, and costs in the sum of $169.60.

At the beginning of the case Appellant objected to the introduction of any evidence on the grounds of failure of the complaint to state a cause of action and defect of parties plaintiff and defendant (Tr. 127), and at the close of all the evidence, made a motion to dismiss, based on the questions of pleading and law theretofore raised through-

out the cause and hereafter discussed, both of said motions above referred to being denied.

The main questions in this case, as we see them, and the order in which they arise, to be covered by the specifications of error herein and argument in their order are:

(a) Did the Court err in allowing plaintiff below to file said amended complaint?

(b) Did the court err in overruling Appellant's motion to dismiss said amended complaint?

(c) Did the Court err in sustaining the motion and striking from Appellant's answer to said amended complaint all of Appellant's affirmative defenses?

(d) Did the Court err on the trial in its rulings on evidence, motions, and in its findings and conclusions, practically all of which can be directly traced to the Court's refusal to adopt plaintiff's contentions as the law governing the case, i.e.:

(1) That said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans.

(2) That said bond contemplated the filing and approval thereof and the licensing and supervision of Chatterton & Son by the State of Montana as public warehousemen, and the fact said bond was never filed, approved or Chatterton & Son were never licensed by the State of Montana, nor any Department thereof, barred recovery on same.

(3) That there was never any delivery of said bond and the same was therefore void, either as a statutory or common law obligation.

III. SPECIFICATIONS OF ERROR.

Specification of Error No. II.

The Court erred in allowing plaintiff to file its amended complaint in this case. (Tr. 266).

Specification of Error No. III.

The Court erred in overruling defendant's motion to dismiss the amended complaint of plaintiffs, filed in this case. (Tr. 266).

Specification of Error No. IV.

The Court erred in sustaining plaintiffs' motion to strike from defendant's answer the first and second affirmative defenses therein contained and by deciding the facts stated in said affirmative defenses were not sufficient to constitute a defense to the cause of action stated in plaintiffs' amended complaint. (Tr. 266).

Specification of Error No. V.

The Court erred in overruling defendant's objection to the introduction of any evidence made at the beginning of the trial thereof, on the grounds that the complaint failed to state a cause of action, either in law or equity, against the defendant and that there was a defect in parties plaintiff and defendant. (Tr. 267).

Specification of Error No. VI.

The Court erred in permitting the introduction in evidence of plaintiffs' Exhibit 2, as follows:

> "MR. WIGGENHORN: I offer Plaintiff's Exhibit 2 in evidence.
>
> MR. BENNETT: If the Court please, we have admitted that this bond was executed by us; but we object to its introduction on the grounds, however, that it is incompetent, irrelevant and immaterial, in that it does not show that it was ever approved or filed with

the Secretary of Agriculture or any other department of the State of Montana.

THE COURT: I suppose some proof with reference to that will come later?

MR. WIGGENHORN: Yes, Your Honor.

THE COURT: As to what was done with it?

MR. WIGGENHORN: I might say, though, that it is confessed at this time that the bond was not filed.

THE COURT: Promptly?

MR. WIGGENHORN: No; nor filed in fact before the beans were deposited. It was filed, in fact, after the beans were deposited, with the Commissioner. In the orderly proof we will present that.

THE COURT: Of course, this goes to the gist of the action, and the bond will be received and considered, subject to the objection, to be ruled on later.

EXHIBIT 2.

(PRINTER'S NOTE: Exhibit 2—Bond No. 3591931 here set forth in the typewritten record is already set forth in the printed record at pages 13-15, and is, pursuant to stipulation of counsel and order of Circuit Judge Wilbur, incorporated herein by reference.) (289)" (Tr. 267).

Specification of Error No. VIII.

The Court erred in overruling the defendant's objection to plaintiffs' question and permitting the introduction of evidence, as follows:

"Q. At any rate, will you state now what, if any, representations or statements were made by you to customers or to persons offering beans for storage, prospective or otherwise, as to whether or not your warehouse was bonded, or whether you had such a bond

MR. BENNETT: We are going to object to that, to that line of testimony as being clearly hearsay and not binding on this company, the defendant, in any

manner and not shown to have been made in the presence of any of the parties to this action.

THE COURT: Well, it seems to me just now that it would be rather material, and part of the business, or at least it would encourage or promote trade with the warehouse to show that they were bonded and that their product would be secure, if stored there.

MR. WIGGENHORN: The theory upon which we are bringing the action, Your Honor.

THE COURT: Yes, I will overrule the objection.

MR. BENNETT: Exception.

I always maintained that we were bonded. It was always my understanding and I so represented to the growers. I communicated that generally to the growers in this territory. It would apply to anyone who asked me." (Tr. 269).

Specification of Error No. IX.

The Court erred in overruling the defendant's objection to plaintiffs' question and permitting the introduction of evidence, as follows:

"Q. Did you in fact offer it as an inducement to have growers store beans in your warehouse?

MR. BENNETT: Just a moment; we make the same objection, and on the ground of it being hearsay testimony. And without interrupting, may I have that objection go to all this line of testimony, without repeating the objection?

THE COURT: Yes; let it be understood that you object to this line of testimony, all of it, and note an exception to the ruling of the Court. And the same ruling.

A. Yes, I did." (Tr. 270).

Specification of Error No. X.

The Court erred in sustaining the plaintiffs' objections

to defendant's question and refusing to permit evidence to be introduced, as follows:

"Q. And did you at any time during your work for any companies other than Chatterton and Son ever make application for license to do business as a public warehouseman?

MR. WIGGENHORN: Object to that as immaterial.

THE COURT: Wasn't that stricken out of the pleadings, wasn't that set up in a separate and distinct answer that I sustained a motion to?

MR. WIGGNEHORN: That is correct.

THE COURT: Well, I will sustain the objection.

MR. BENNETT: Note an exception." (Tr. 270).

Specification of Error No. XII.

The Court erred in sustaining the plaintiffs' objections to defendant's question and refusing to permit evidence to be introduced, as follows:

"RECROSS EXAMINATION

By MR. BENNETT:

I got this bond for the protection of the storage holders.

Q. But you realized, or thought at the time that you were getting it, that it was necessary to be filed in the State of Montana in order to do business, did you not?

MR. WIGGENHORN: I object to that as immaterial.

THE COURT: Sustain the objection.

MR. BENNETT: Note an exception.

THE COURT: He has already gone into that, hasn't he? He said he got it, in direct testimony, for the protection of the bean owners.

MR. BENNETT: Well, I believe, if I might show,

that this man will say that those were procured to file with the State of Montana." (Tr. 271).

Specification of Error No. XIV.

The Court erred in overruling the defendant's objection to plaintiff's question and in permitting the introduction of evidence as follows:

"Q. And did that in any way enter into your determination and conclusion to put the beans in that warehouse?

MR. BENNETT: Just a moment. That is objected to as incompetent, irrelevant and immaterial, not binding on this defendant, and hearsay.

MR. WIGGENHORN: That is our case, Your Honor; that is our position, of course, that there must be a consideration, suing as we are on a common law bond, that we acted on reliance—each individual owner, that we acted upon reliance on the bond which had been given.

THE COURT: I think so. Overrule the objection.

MR. BENNETT: Note an exception.

A. It did." (Tr. 273).

Specification of Error No. XV.

The Court erred in overruling the defendant's objection to plaintiff's question and in permitting the introduction of evidence as follows:

"WILBUR SANDERSON,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

(MR. BENNETT: It is stipulated between counsel that this witness will testify in substance the same as the preceding witness; and to save time, that as to this line of testimony we wish to register a general objection that it is incompetent, irrelevant and immaterial, hearsay and not binding on this party defendant.

THE COURT: That may be understood; and it is overruled, and it is excepted to.)" (Tr. 274).

Specification of Error No. XVI.

The Court erred in overruling the defendant's objection to plaintiffs' question and in permitting the introduction of evidence as follows:

"My name is H. A. Appleby. I live in the vicinity of Billings. I am one of the bean growers that deposited my beans in the Chatterton warehouse for the 1930 crop.

MR. WIGGENHORN: And will you again admit that this witness will testify to the same thing that Mr. Deavitt testified, subject to your objection of course?

MR. BENNETT: Yes.

THE COURT: All right." (Tr. 274).

Specification of Error No. XVIII.

The Court erred in sustaining the plaintiff's objection to defendant's question and refusing to permit evidence to be introduced, as follows:

"A. They do not store grain in warehouses.

Q. That is true, but when you refer to a warehouseman and when you refer to a warehouse receipt, it might cover both the storage of beans or grain, regardless of whether they are in the warehouse or otherwise?

MR. WIGGENHORN: Object to that as immaerial. "Warehouseman" was not the expression referred to.

THE COURT: Yes, sustained.

MR. BENNETT: Exception." (Tr. 276).

Specification of Error No. XXIII.

The Court erred in overruling defendant's Motion for Dismissal of the action, made at the end of plaintiffs' case, as follows:

"MR. BENNETT: At this time, counsel for the defendant, Fidelity and Deposit Company of Maryland, moves for a dismissal of this action on the grounds of failure to state or prove a cause of action, either in equity or law, against this defendant; for failure to prove that the so-called plaintiff is a true party, and for failure to show the capacity of the plaintiff to bring this action or in any way connect the plaintiff to the case and issues herein.

And for a further ground, for failure to prove that there is any compliance with the statutes of the State of Montana covering this so-called action." (Tr. 281).

Specification of Error No. XXVI.

The Court erred in overruling defendant's Motion to Dismiss, made at the close of all the evidence, as follows:

"MR. BENNETT: If the Court please, at this time I would like to renew, for the purpose of the record, the motion to dismiss that we made at the close of the plaintiffs' evidence, on the grounds therein stated, and on the further grounds that there is no proof shown anywhere that this bond covers the plaintiff, or that there was any mistake in fact as between the plaintiff, The State of Montana, herein and the defendant; that there is a defect in parties, in that the State of Montana shows no basis for making a claim under this bond, the bond not having been approved and filed and no license issued, as required by the laws of the State of Montana; and on the further ground that Chatterton & Son was a necessary party to this action, and has not been joined." (Tr. 283).

Specification of Error No. XXVII.

The Court erred in holding and deciding that the plaintiff below could recover on the grounds that, if the said bond was not good as a statutory undertaking, it was good as a common law bond. (Tr. 284).

Specification of Error No. XXVIII.

The Court erred in deciding that this action could be brought in the name of the State of Montana. (Tr. 284).

Specification of Error No. XXIX.

The Court erred in holding and deciding that the defendant intended to insure beans when they used the form containing the word, "grain" in said bond. (Tr. 284).

Specification of Error No. XXX.

The Court erred in holding and deciding that the said bond should be reformed and the word, "beans" inserted therein in the place of the word, "grain". (Tr. 284).

Specification of Error No. XXXI.

That the evidence is insufficient to support the findings and conclusions of the District Court. (Tr. 284).

Specification of Error No. XXXII.

That the Court erred in failing to find that on or about the 7th day of January, 1930, said Chatterton & Son, by written application, signed by H. E. Chatterton, President, and A. H. Madsen, Secretary of said company, made application to defendant, Fidelity and Deposit Company of Maryland for a Public Warehouseman's bond to the State of Montana. (Tr. 284).

Specification of Error No. XXXIII.

That the Court erred in failing to find that on the 7th day of January, 1930, pursuant to said application, a bond was executed by defendant to the State of Montana to qualify Chatterton & Son under the laws of said state as public warehousemen in the storage and handling of grain. (Tr. 285).

Specification of Error No. XXXIV.

That the Court erred in failing to find that at the time of the executing of said bond defendant, through its agents, knew that Chatterton & Son were, among other things, engaged in the handling and storage of grain, and said bond was executed with the intent of qualifying them as said grain warehousemen in the State of Montana. (Tr. 285).

Specification of Error No. XXXV.

That the Court erred in failing to find that said bond was conditioned upon said Chatterton & Son making application to the Department of Agriculture, Labor and Industry, of the State of Montana, for a license to conduct and carry on the business of public warehousemen in the State of Montana, and contemplated the licensing and supervision of said Chatterton & Son by the State of Montana under the laws of said state governing public warehousemen. (Tr. 285).

Specification of Error No. XXXVI.

That the Court erred in failing to find that neither said bond nor any renewal thereof was ever approved or filed with the State of Montana nor the Department of Agriculture, Labor and Industry thereof. (Tr. 286).

Specification of Error No. XXXVII.

That the Court erred in failing to find that no application was ever made by Chatterton & Son for a license to conduct business as public warehousemen, nor any license ever issued by the State of Montana, nor any department thereof, to said Chatterton & Son to engage in business as public warehousemen, as provided under the Statutes and laws

of said State of Montana, or for any other purpose or at all. (Tr. 286).

Specification of Error No. XXXVIII.

That the Court erred in failing to find that said bond in controversy was executed with intent to cover the storage and handling of grain, as distinguished from beans. (Tr. 286).

Specification of Error No. XXXIX.

That the Court erred in failing to find that said bond contemplated the licensing and supervision of Chatterton & Son by the State of Montana and the facts disclose that said Chatterton & Son were never licensed by the State of Montana, nor any Department thereof. (Tr. 286).

Specification of Error No. XL.

That the Court erred in failing to find that there exists no basis for the plaintiff making claim under said bond. (Tr. 287).

Specification of Error No. XLI.

That the Court erred in failing to find that there exists no basis for a reformation of said bond. (Tr. 287).

Specification of Error No. XLII.

The Court erred in transferring this cause to the equity side of the docket. (Tr. 287).

Specification of Error No. XLIII.

The Court erred in finding that the general allegations of said Plaintiffs' Bill of Complaint were true. (Tr. 287).

Specification of Error No. XLIV.

The Court erred in ordering and granting judgment in favor of the plaintiff and against the defendant for the sum of Thirteen Thousand, One Hundred and no/100 Dol-

lars ($13,100.00), with interest thereon at the rate of six per cent (6%) per annum from July 15th, 1931, when the said bond or undertaking sued on in this action is limited in the penal sum of Ten Thousand and no/100 Dollars ($10,000.00). (Tr. 287).

IV. ARGUMENT.

A. Filing Amended Complaint.

Specification of Error No. II.

We have previously shown that the loss of beans was complete and this action accrued July, 1931; that this action was begun in May, 1932, answer and reply filed, and the case was at issue on March 23rd, 1933. That on December 10th, 1934, or some fifteen months later, the Appellee (plaintiff below) asked leave to file its amended complaint.

It is apparent that the bond in controversy was issued under and pursuant to Sec. 3589 of the Revised Codes of Montana, 1921, which provided in paragraphs two and three thereof, as follows:

> "Each person, firm, corporation or association of persons operating any public warehouse or warehouses subject to the provisions of this Act, and every track-buyer, dealer, broker or commissionman, or person or association of persons, merchandising in grain shall, on or before the first day of July of each year, give a bond with good and sufficient sureties to be approved by the Commissioner of Agriculture to the State of Montana, in such sum as the Commissioner may require, conditioned upon the faithful performance of the acts and duties enjoined upon them by the law."
>
> "Every person or persons, firm, co-partnership, corporation, or association of persons, operating any public warehouse or warehouses, and every track-buy-

er, dealer, broker, commission man, person or association of persons merchandising grain in the State of Montana, shall, on or before the first day of July of each year, pay to the State Treasurer of Montana, a license fee in the sum of Fifteen ($15.00) Dollars for each and every warehouse, elevator, or other place, owned, conducted, or operated by such person or persons, firm, co-partnership, corporation or association of persons, where grain is received, stored and shipped, and upon the payment of such fee of Fifteen ($15.00) Dollars for each and every warehouse, elevator or other place where grain is merchandised within the State of Montana, the Commissioner of Agriculture shall issue to such person or persons, firm, co-partnership, corporation or association of persons, a license to engage in grain merchandising at the place designated within the State of Montana, for a period of one year. Any person, firm, association or corporation who shall engage in or carry on any business or occupation for which a license is required by this Act without first having procured a license therefor, or who shall continue to engage in or carry on any such business or occupation after such license has been revoked (save only that a public warehouseman shall be permitted to deliver grain previously stored with him), shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Twenty-five ($25.00) Dollars nor more than One Hundred ($100.00) Dollars, and each and every day that such business or occupation is so carried on or engaged in shall be a separate offense."

That it contemplated inspection of said public warehousemen, as shown by paragraph one thereof, as follows:

"On June 30th of each year every warehouseman shall make report, under oath to the Commissioner of Agriculture, on blanks or forms prepared by him, showing the total weight of each kind of grain re-

ceived and shipped from such warehouse licensed under the laws of Montana, and also the amount of outstanding storage receipts on said date, and a statement of the amount of grain on hand to cover the same. The Commissioner of Agriculture may also require special reports from such warehouseman at such times as the Commissioner may deem expedient. The Commissioner may cause every warehouse and business thereof and the mode of conducting the same to be inspected by his authorized agent, whenever deemed proper, and the books, accounts, records, paper and proceedings of every such warehouseman shall at all times during business hours be subject to such inspection. Any person, firm, or corporation, who shall knowingly falsify any of its reports to the Department of Agriculture, or who shall refuse or fail to make such reports when requested to do so by the Commissioner of Agriculture or his agents, or who shall refuse or resist inspection as provided in this section, shall be guilty of a misdemeanor and be punished by a fine of not less than Fifty ($50.00) Dollars nor more than Five Hundred ($500.00) Dollars."

It will be remembered that demand had previously been made on Appellant by the Commissioner of Agriculture of the State of Montana and upon refusal to pay the penalty amount thereof this action was brought in the State Court under Section 3589.1, of the Revised Codes of Montana, which provides:

"Whenever any warehouseman, grain dealer, track buyer, broker, agent or commission man is found to be in a position where he cannot, or where there is a probability that he will not meet in full all storage obligations or other obligations resulting from the delivery of grain, it shall be the duty of the Department of Agriculture, through the Division of Grain Standards, to intervene in the interests of the holders of

warehouse receipts or other evidences of delivery of grain for which payment has not been made, and the Department of Agriculture shall have authority to do any and all things lawful and needful for the protection of the interests of the holders of warehouse receipts or other evidences of the delivery of grain for which payment has not been made, and when examination by the Department of Agriculture shall disclose that for any reason it is impossible for any warehouseman, grain dealer, track buyer, broker, agent or commission man to settle in full for all outstanding warehouse receipts or other evidences of delivery of grain for which payment has not been made, without having recourse upon the bond filed by said warehouseman, grain dealer, track buyer, broker, agent or commission man, it shall then be the duty of the Department of Agriculture for the use and benefit of holders of such unpaid warehouse receipts or other evidences of the delivery of grain for which payment has not been made, to demand payment of its undertaking by the surety upon the bond in such amount as may be necessary for full settlement of warehouse receipts or other evidences of delivery of grain for which pawment has not been made. It shall be the duty of the Attorney General or any County Attorney of this State to represent the Department of Agriculture in any necessary action against such bond when facts constituting grounds for action are laid before him by the Department of Agriculture.''

That the cause was statutory in every respect is seen by a perusal of the original complaint. (Tr. 2).

In December, 1934, the attorneys evidently decided they couldn't sustain this action under the statute without a reformation, so they asked leave to file the so-called amended complaint, which was in reality a new cause of action, asking for ''reformation *on grounds of mistake*'' and com-

pletely abandoning the attempt to recover under the Statute, and to attempt recovery on the reformed instrument on the theory of a common law bond or undertaking.

In the Court's final decision (Tr. 259) the bond was reformed and recovery allowed on the basis of it being binding on the Appellant as said common law bond.

The original cause was based on the insolvency of Chatterton & Son in July, 1931, and that plaintiff and counsel were cognizant of all the facts constituting mistake, if there was any, is shown by the allegations of the original complaint, in which it was alleged that defendant knew of the exact nature and kind of business Chatterton & Son were engaged in and executed and issued the bond accordingly, and said counsel and plaintiff were apprised of the defense of defendant on the grounds of same being a "grain bond", rather than a bean bond, as early as the filing of the answer, to-wit, March 9th, 1933.

In the application to file the amended bill in equity, it is asked that said bond on which the original action is based be reformed to correspond with the intent of the parties and recovery thereon under said reformed instrument.

That plaintiff abandoned any attempt to state a cause under the Montana Warehouse Statutes is shown wherein, by Section II of said amended complaint, it is alleged with reference to the insolvent Chatterton & Son: "That said corporation had never qualified under the laws of the State of Montana to do business in the State of Montana," while the original cause attempted to show a compliance

with the act, giving the State the right to sue on behalf of the warehouse receipt holders.

Under Article VIII, Sec. 28 of the Constitution of the State of Montana, it is provided:

> "Sec. 28. There shall be but one form of civil action, and law and equity may be administered in the same action."

Section 9033, subdivision 4, of the Revised Codes of Montana (1921 and 1935) provides:

> *"Two-year limitation. Within two years:*
>
> (4) An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Also, Sec. 9032, subdivision 1, of the Revised Codes of Montana, (1921 and 1935), provided:

> *"Within two years:*
>
> (2) An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state."

It is certain and must be conceded that Appellees knew all the facts governing the matter of mistake at the time they filed the original complaint in May, 1932,—so under Section 9033, the Statute of Limitations, they were barred from asking for this new relief.

(1) STATUTE OF LIMITATIONS.

The Appellant, in its arguments and objections to the filing of the amended complaint, showed to the Court below that an action for reformation is barred by the Statute of Limitations of the State of Montana. Appellees attempted to make the point that in equity the Statutes of

Limitation do not govern. As a general proposition, both in law and equity, in the Federal Courts the Statute of Limitations of the States are recognized and given effect, except in those cases when the same in equity might abrogate the Court's own principles or deny rights asserted under the Constitution or laws of the United States. Quoting from Hughes, Fed. Practice, Volume 7, Section 4132, we find the following:

> "In those States where the Statutes of Limitation are made applicable to suits in equity, as well as to actions at law, and in terms embrace the specific case, and in cases of concurrent jurisdiction, they have been held as obligatory, as such, upon the national courts of equity as upon the state court or as they are in actions at law, and the courts of equity should act in obedience, rather than upon analogy, to them; ***** In the application of the doctrine of laches, the Federal equity court usually acts, or refuses to act, in analogy to the state statute limiting actions at law of like character. ****
>
> In passing upon questions relating to property in the several States, the Federal courts of equity recognize the Statutes of Limitation and give them the construction and effect that are given by the local tribunals, and they consider equitable rights barred by the same limitations, ***** the law and decisions of the States as to the statute of limitations should be followed as to laches."

Citing a case from this Court, Norris vs. Haggin, 28 Fed. 275, affirmed 136 U. S. 386; 34 L. Ed. 424; also Higgins Oil Co. vs. Snow, 113 Fed. 433.

And in Cyclopedia of Federal Procedure, Volume 7, Section 3538, at page 390, it is stated:

> "'Where the reformation of a note is sought in

equity as a basis for the recovery of money paid thereunder, the fact that the recovery is barred by limitations is as effective in equity as at law."

Bank of U. S. vs. Daniel, 12 Pet. 32, 9 L. Ed. 989.

Counsel's statement that in the Federal Courts the Statute of Limitations is only considered in reference to laches is not correct, except in the cases where the Court is considering the question of laches they do turn to the Statute of Limitations in the States for guidance, *but in cases like the present, where there is a State Statute covering actions for reformation on the grounds of mistake, the Federal Court must follow the same.* An action for reformation in the State Court would be in the form of an equitable action, the same as in the Federal Court, so that it might be said that the Montana Statute of Limitations of two years on suits for reformation is an express limitation on a suit in equity and should be taken cognizance of by the Federal Court of that jurisdiction.

(2) RIGHT TO AMEND.

Rule 18 of the lower Court, relating to amendments of pleading, provides generally that the Court will follow the laws of the State at the time and place of application for leave to amend, and Sections 9186 and 9187 of the Revised Codes of 1921 covered the rights of amendment of pleadings under the Montana law, as follows:

"Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or twenty days after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have twenty days thereafter in which

to answer, reply, or demurrer to the amended pleading.''

It may be stated as a general proposition that ordinarily leave to amend is discretionary with the Courts and that they are lenient in granting same. But there is an exception to this rule, wherein the attempted amendment sets up a new cause of action under the guise of an amendment to the original cause, and especially where the new cause is barred by the Statute of Limitations. In such cases, when the above is clearly shown, there is no discretion allowed in the Court. Bancroft's Code pleading, Vol. 1, Section 523, page 757; 37 C. J. 1074, Section 511; Cyclopedia of Federal Procedure, Vol. 4, page 736, Section 1319.

A perusal of the authorities will show that there is no conflict as to the refusal to allow amendments when the above appears and the only conflict apparent is what constitutes a new cause of action. The Courts have laid down several tests for determining the application of the rule, i. e., whether a new cause of action is set forth, to-wit:

(1) Would a recovery had upon the original bar a recovery under the amended pleading?

(2) Would the same evidence support both of the pleadings?

(3) Is the measure of damages the same in each case?

(4) Are the allegations of each subject to the same defenses? See 37 C. J. page 1076, Section 512.

Taking the above tests and applying them to the proposed amended complaint, we answer the questions as follows:

(1) If the objector, the Fidelity and Deposit Company

of Maryland, should have won in the original action, to-wit, action on the Statutory Bond, that would not have foreclosed the plaintiff from asking for a reformation and seeking recovery on the reformed instrument, if said application for reformation was made within the period designated in the Statute of Limitations governing such action.

(2) It is apparent that an action for reformation on the grounds of mistake or fraud requires different and additional evidence from that required in an ordinary proceeding on contract, as originally set forth in this action.

(3) That the measure of damages is the same herein is because they ask for reformation only as to the type of bond, and not as to the amount.

(4) It is apparent that the allegations of the amended complaint are not subject to the same defenses as the original complaint, in that under the original cause of action the answer was based on the failure of plaintiff to come under the Statute sued upon, while under the proposed amended complaint it would require defendant to plead and prove lack of mistake or fraud and defend an action which is in the nature of an attempt to recover on a common law bond or agreement, as distinct from a Statutory obligation.

Under Section 513 of 37 C. J. at page 1077, another form of test is set forth, to-wit, a departure from law to law, stating, "Wherein original pleading declares especially on Statute for recovery an amendment based on common law liability introduces a new cause of action, subject to the Statute of Limitation," and asserting generally that Courts do not allow amendments when there is a departure

from law to law. Again we call the Court's attention to the fact that this is a departure from an original action brought at law for recovery under a particular Statute of the State of Montana, and that the proposed amended complaint departs in that this is a new cause in equity for reformation and a departure from specific recovery under the Statute to one under the common law.

This is not only a departure from law to law, but is a departure from fact to fact, as discussed under Section 514 of 37 C. J., page 1077, in that under the original cause the facts involved were, (a) whether or not plaintiff complied with the Statute to such an extent that the defendant is bound under same; (b) whether or not the bond written was a grain bond, as prescribed under said Statute. Under the amended complaint the action is based on the fact as to whether or not defendant wrote a grain bond when they intended to write a bean bond, and whether or not they are not liable under the same by reason of the fact that they wrote said bond and the bean holders relied on same, regardless of whether or not there was any compliance with the Statute or whether or not Chatterton & Son, the warehousemen, ever complied with the Statutes of the State of Montana, qualifying them to operate a warehouse in said State.

It would seem that under any view of this proposed amended complaint it was an attempt to state a new, separate and independent cause of action from that in the original complaint, and that the action would have been brought as a new cause of action if same was not barred under and

pursuant to Section 9033 of the Revised Codes of Montana, 1921.

It is also apparent that this was an attempt to state a new cause of action some two years and seven months after the original action was started, and one month short of two years after this cause was at issue.

Even equity does not favor amendment of bill—so as to introduce new matter and entirely change the purpose of the suit. Hughes Federal Practice, Vol. 7, Sec. 4413.

In the case of Shields vs. Barrow, 58 U. S. (17 How.) 130 - 15 L. Ed. 158, there was an attempt to change the bill from recession to one for specific performance. The Court said:

> "'Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the Vice-Chancellor, in Verplank v. The Mercantile Ins. Co., 1 Edwards, Ch. 46. Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. See also, the authorities there referred to, and Story's Eq. Pl. 884.
>
> We think sound reasons can be given for not allowing the rules for the practice of the circuit courts respecting amendments, to be extended beyond this; though doubtless much liberality should be shown in

acting within it, taking care always to protect the rights of the opposite party.

See Mavor v. Dry, 2 Sim. & Stu. 113.

To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily incumbered with the original proceedings, increases expenses, and complicates the suit; it is far better to require the complainant to begin anew.

To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject."

U. S. vs. Whitted—245 Fed. 629.

Nor could plaintiffs below have declared that this was merely in the nature of a supplemental bill, because a bill called a supplemental bill, but which is in effect a new proceeding, does not operate to prevent the effect of the Statute of Limitations.

White vs. Joyce, 158 U. S. 128; 39 L. Ed. 921.

"Therefore where the amendment introduces a new claim not before asserted, it is not treated as relating back to the beginning of the action, so as to stop the running of the Statute, but is the equivalent of a fresh suit upon a different cause of action and the Statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction."

17 R. C. L. 816, Sec. 181-182.

The reformation is the main relief and prerequisite to enforcement. The fact that plaintiff, in its amended complaint, asks for reformation and enforcement in the same cause does not help as far as the Statute of Limitations is concerned, in that the main and necessary relief prerequisite to anything else must be the reformation. Sec. 153 of

Vol. 53 C. J. on page 1002, discusses this as follows:

> "Where reformation and enforcement are sought in the same proceedings, there is authority to the effect that a rule elsewhere enforced that an action for reformation of the contract is not barred so long as the action on the contract itself is not barred, is inoperative where the reformation *is not merely incidental to the main relief sought, but is an essential prerequisite to the asking of any relief,* and that the limitations applicable to a proceeding purely for reformation is to be employed and an extension until such time as action on the contract would be barred is not proper." (Italics ours).

In the case of Bradbury vs. Higginson (Cal.) 140 Pac. 254, passing on the point of limitations of actions when the reformation is *not merely incidental* to the relief asked, the Court said:

> "(5) The opinion in the Gardner case contains, further, an expression to the effect that an action for the reformation of a contract is not barred so long as an action on the contract itself might be brought. If this be the correct rule, we do not consider it applicable to a case like the one before us, where the reformation is not merely incidental to the main relief sought, but is an essential prerequisite to the asking of any relief.
>
> For the reasons stated, we conclude that the demurrer to the answer was rightly sustained."

(3) WHAT FORM OF ACTION WAS PLAINTIFF ATTEMPTING TO STATE UNDER THE AMENDED COMPLAINT

Counsel wishes to call the attention of the Court that in Montana there are at present three acts dealing with warehousemen:-

(1) Sec. 3589, as amended by Chapter 41, Session Laws of Montana, 1923, dealing with grain warehousemen: Sec. 3589 A, being the section providing for the intervention of the Department of Agriculture in suits on behalf of receipt holders. From the title of the original complaint, "State of Montana, et al, for the use and benefit of the holders of warehouse receipts in the public warehouse seed grain elevator", it would seem plaintiff was pursuing his remedy under this section.

(2) Sec. 3592.1 — 3592.2, Revised Codes of Montana, 1921, being amended by Chapter 50, Session Laws of Montana, 1927, provides for the licensing and bonding of warehousemen dealing in "agricultural seeds." This amendment carries no provision, however, for the intervention of the State of Montana through its Department of Agriculture, and it would be presumable that plaintiff could not attempt to proceed under this Act.

(3) In March, 1933, nearly a year after this action was begun, the Montana Legislature (Chapt. 55, Session Laws, 1933) passed an Act dealing exclusively with *bean* warehousemen, which provides for an action by and through the State, as in the original grain Act.

Any attempt to amend in order to transfer the cause of action from (1) above to Act designated (2) and/or (3) would be met by the objections that same being pursuant to an entirely different and distinct statute, is barred by the Montana two year limitation relating to statutory actions. 9032 Revised Codes of Montana, 1921, Sec. 1, as follows:

"1. An action upon a statute for a penalty or for-

feiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

9033, Revised Codes of Montana, 1921, Sec. 1, as follows:

"1. An action upon a liability created by statute other than a penalty or forfeiture."

Of course, it would hardly appear that plaintiff was attempting to pursue an action under (3) above, since the Act was not in existence at the time the cause arose.

Then the question arises, if plaintiff below had abandoned all attempts to proceed under any of the above statutory remedies, just why was this action prosecuted by the State of Montana?

Regardless of how we look at the new pleading, it was a separate, new and distinct cause of action.

The cases so generally upheld the objections of Appellant to the amended complaint of Appellees that it would seem unnecessary to discuss the question.

See, however:

Melvin vs. Hagadorn, 127 N.W. 139;
Union Pac. Ry. Co. vs. Wyler, 39 L. Ed. 983, 158 U. S. 285;
Boston & N.R. Ry. Co. vs. D'Almedo, 108 N.E. 1065;
U. S. vs. Salem, 244 Fed. 296;
Land Co. of New Mexico vs. Elkins, 20 Fed. 545;
Bird vs. Grapnell, 102 S.E. 131;
Scholle vs. Finnell, 159 Pac. 1179;
Grenfell Lumber Co. vs. Peck, 155 Pac. 1012;
Koch vs. Wilcoxson, 158 Pac. 1048;
Webber vs. Phister, 197 Pac. 765;
Christian vs. Ross, 88 S.E. 986;
Bryson vs. Monaghan, 124 S.E. 167;
Martin vs. Palmer, 104 S.E. 308;

Peiser vs. Griffin, 57 Pac. 690.

Below, counsel for plaintiff laid much stress on Section 274 A of the Judicial Code (28 U.S.C.A. 397) known as the Conformity Act, also Equity Rule 22, relating to amendments and transfer of causes to conform with *proper practice.*

Appellant has no dispute with the general proposition so set forth therein, allowing amendments and transfer *"to obviate the objection that a suit was not brought on the right side of the court."*

If Appellees were entitled to equitable relief, the fact that it brought its action at law should not bar it, no more in the Federal Court than in the State of Montana, where the distinction between law and equitable relief is abolished, but we do not believe these Conformity Acts, or any others cited, or which could be cited by counsel, goes to the proposition where there is involved the pleading of *an entirely new cause of action,* even under the Conformity Act.

In the case of Proctor & Gamble Co. vs. Powelson, 288 Fed. 299, refusing to allow a similar amendment, wherein it was attempted to change from an action of recision to a partnership accounting, the Court, on page 307, said:

> "The purpose of section 274a was to obviate a new action or suit merely because the litigant had brought his suit on the wrong side of the court. This section did not mean to confer the power upon the court of transferring the cause from law to equity or equity to law, as the case might be, *where so to do would require setting up an entirely different cause of action and supporting the same by an entirely different character and subject-matter of proof. The words "to conform them to the proper practice" are significant, because*

they indicate that Congress was dealing with a practice question, and what the Congress was endeavoring to accomplish was the avoidance of a second trial where the cause of action set up, the testimony adduced in support thereof, and the relief sought indicated that the action or suit had been brought on the wrong side of the court; *but we are satisfied that this useful and remedial statute was not intended to empower the Court to transfer the cause, where in order to bring it into the law or equity side, as the case might be, it would be necessary to plead an entirely different cause of action, supported by testimony wholly or in part different, and where the judgment or decree to be obtained would thus rest upon entirely different pleadings and substantially different testimony.'' (Italics ours).*

See also Massachusetts Mutual Life Ins. Co. vs. Hess, 57 Fed. (2nd) 884.

America Land Co. vs. City of Keene, 41 Fed. (2nd) 485, where the court refused right to amend to show fraud where the original complaint was to enjoin the enforcement of an ordinance.

American Mills Co. vs. Hoffman, 275 Fed. 285.

Counsel will counter with the proposition ''but we are not changing the cause of action!'' The court will remember that counsel wanted to escape, if possible, from the proposition that originally the action was brought under the Grain Warehousemans Act of the State of Montana, which, after all, is the only Act under which the form of procedure was admissible.

They are in the same category as plaintiff in the case of Kuhlman vs. W. & A. Fletcher Co., 20 Fed. (2nd) 465, where, under the Conformity Act, it was attempted to

slip from a tort on the law side to a cause in admiralty, wherein the Court said, on page 467:

> "Which of the two remedies did the plaintiff invoke in this case? Certainly it was not by libel in admiralty, for it was into a court of admiralty he strove to enter by amending the pleadings he had filed in a court of law. Did he elect the action at law afforded him by the Merchant Marine Act of 1920 and institute it on the law side of the District Court? *Although he made no formal or verbal election, we think he made one nevertheless; and for these reasons: First, he entitled his suit in that court; and second, consciously or not, he pleaded the statute in pleading his case. Distinguishing between counting on a statute and reciting a statute (as these words are familiarly known to pleaders), he, nevertheless, pleaded the statute by stating his case within its terms, though without mentioning it.* Gould's Pl. Ch. 3, Sec. 16, note 3. When the facts as pleaded brought the case within the statute, the statute is invoked without referring to it. Luckenbach S. S. Co. v. Campbell (C. C. A. 9th) 8 F. (2d) 223, 224; and when a seaman invokes the statute by a suit at law pleaded within its erms, the election required by the statute is made by instituting the suit. Hammond Lumber Co. v. Sandin (C. C. A. 9th) 17 F. (2d) 760, 762. Having thus elected the statutory remedy by instituting the suit at law, the plaintiff had no right later to amend his pleadings and transfer his action from the law side of the court to its admiralty side. He was bound by his election. For this reason the trial court committed no error in refusing him leave to amend his complaint." (Italics ours).

Here too, either consciously or not, plaintiff below made its election under 3589-A of the Revised Codes of Montana, 1921, referring to insolvent grain warehousemen and

the intervention by the Department of Agriculture of the State of Montana.

The amended complaint abandoned this action to pursue a remedy as on a common law undertaking after reformation of the bond. It attempted to bring an independent action in equity to reform a bond so as to indemnify against the loss of beans instead of grain. There was no provision in Montana covering bean warehousemen at that time, so plaintiff below amended the whole complaint to bring it in line with the theory of a common law bond, all irrespective of whether the bond was ever filed with the State or ever required to be.

Appellees admit by paragraph II of the amended complaint that Chatterton & Son never qualified to do business in the State of Montana so that, instead of proceeding under the theory of compliance, plaintiff states what, (1) bond intended to cover beans, (2) was entered into voluntarily, on a valid consideration.

In conclusion of this part of the argument, it must be observed that plaintiff below changed its whole theory and cause of action, in that this action was originally brought under the *Public Warehousemens' Act* by the Department of Agriculture under the Sections of the Revised Codes of Montana, to-wit, 3555 to 3649, and the rights of the Department of Agriculture thereunder. The attempt by plaintiff to reform the bond must necessarily have meant that it abandoned its former cause of action.

We call the attention of the Court to Section 3574, Revised Codes of Montana, 1921, of this Act, which is determinative, wherein we find the following:

"Definition of terms. The term "public warehouse" includes any elevator, mill, warehouse, or structure in which *grain* is received from the public for storage, shipment or handling, whenever such grain is carried or intended to be carried to or from such warehouse, elevator, mill or structure by common carrier. The term "public warehouseman" shall be held to mean and include every person, association, firm and corporation owning, controlling or operating any public warehouse in which grain is stored or handled in such a manner that the grain of various owners is mixed together, and the *identity of the different lots or parcels is not preserved."* (Italics ours).

This was amended in 1929 by the addition of the following:

"Whenever the word "grain" is mentioned in this Act it shall be construed to include flax."

That is the only major change made in this, and it was not until 1933 that we had a specific Act dealing with beans. If we read the above in connection with Section 3573 of the Revised Codes of Montana, 1921, as follows:

"The division of grain standards and marketing. The Department of Agriculture, Labor and Industry, through the Division of Grain Standards and Marketing, shall enforce all the laws of the State of Montana concerning the handling, weighing, grading, inspection, storage and marketing of grain, and the management of *public warehouses."*

it will be seen that, unless the word "grain" included beans, then the plaintiff in this case had no right of action under and pursuant to the Statutes of the State of Montana through the Department of Agriculture, as this case was begun. It is impossible to arrive at any other conclusion than that plaintiff below felt that grain did not

include beans and that it must abandon any attempt to proceed under the Statutes governing an action of this character, and must necessarily attempt a reformation of this bond from the "Public Warehousemens' Bond" under which application was made by plaintiff, and under which this bond was written, and attempt to recover merely on the contract itself as a common law obligation, separate and distinct from any statutory right as originally set forth.

B. FAILURE TO SUSTAIN MOTIONS TO DISMISS AND OBJECTION TO INTRODUCTION OF EVIDENCE

Specification of Error No. III.

Specification of Error No. V.

Most of the grounds urged by Appellant under the previous heading relative to the amending of the complaint are applicable here, but in addition, there are other questions raised for the first time by the motion to dismiss, and later, by objections to introduction of evidence, which are here consolidated for discussion.

(1) CHATTERTON & SON ARE INDISPENSABLE PARTIES.

In order for Appellees to reform this instrument involved in the action, it was necessary to join Chatterton & Son, the obligor, as said Chaterton & Son are indispensable parties to this action. This point is specifically raised in paragraphs V and VII of the Motion to Dismiss. (Tr. 67). In 53 Corpus Juris, 1005, dealing with reformation of instruments, it is stated:

"*In a suit to reform contract of suretyship the prin-*

cipal obligor is a necessary party to an action for reformation.'' (Italics ours).

Several cases are cited in support of that doctrine and there is nothing therein shown to the contrary. The reasoning given is absolutely sound, and was certainly binding on the lower Court in this action, namely, that because of the surety's right to subrogation against the principal in case of a recovery against them on their secondary liability, the Court should do nothing which will affect the rights of the parties among themselves without having all of the parties who signed the bond before it in the cause. In fact, the above is almost the exact quotation from State vs. Kronstadt, (Iowa), 216 N.W. 707. In this case Appellees have failed to make Chatterton & Son, the principal under the bond, a party, plaintiff or defendant, and still allege that *the mistake was between the principal and surety,* and asked the Court to determine that such was the case and that the bond be reformed to conform with the intentions of the parties, which would, in effect, fix the judgment against the principal under the matter of subrogation to the Appellant.

What right had the State of Montana to bring a suit to reform this bond, when there is no allegation that the State, itself, made any mistake in connection with the bond or that there was any agreement with the State, or any of its representatives, that the warehouse bond should be executed, nor is there any claim that the State relied upon the fact that the bond, as executed, was intended to cover a bean warehouse and issue a license covering such bean warehouse?

The above would seem to apply to the owners of the beans, for whose benefit the suit is brought, and especially when the State of Montana asks for a reformation based on the allegations that there was a mistake between the principal obligor and the surety, and asks that the contract be reformed without having both of the parties to the contract before the Court.

(2) FAILURE OF COMPLAINT GENERALLY TO STATE CAUSE OF ACTION ON BOND.

The amended complaint filed by plaintiffs below failed to show that there was ever a compliance with the State statutes of Montana in reference to a statutory bond, although the suit was based on said bond. In fact, in paragraph II and paragraph VII it was expressly alleged that the said corporation, Chatterton & Son, had never qualified to do business in the State of Montana. In other words, there was no allegation showing that the original bond and the renewal thereof was approved by the Commissioner, nor was a license issued upon the strength of the said bond prior to the time any of the owners of the beans placed their beans in the warehouse, or at any other time or at all.

In 9 Corpus Juris, at page 16, it is stated:

> "As a general rule, a bond is not perfected until delivery thereof, and therefore delivery is essential to its validity, and it takes effect from that date. But in case of a statutory bond, the approval and filing takes the place of delivery."

In this case the bond was for the purpose of securing a license to do business, and was one of the requisites to doing business in the State, and when plaintiffs below set

forth that Chatterton & Son never qualified to do business in the State, they were correct in that Chatterton & Son never filed their bond and were never licensed to do business as bean warehousemen, grain warehousemen, or public warehousemen of any kind or character.

In paragraph X of the amended complaint (Tr. 61), plaintiffs below attempted to plead that the bond finally came into the hands of the Department of Agriculture, Labor and Industry, of the State of Montana, but there is no showing *WHEN OR BY WHOM THE SAME WAS DELIVERED, OR HOW SAID BOND EVER CAME INTO THE POSSESSION OF THE STATE.*

In 9 Corpus Juris, at page 17, it is stated:

> "A bond must be delivered by the party whose bond it is, or by his agent or attorney. Where a bond is signed and sealed but not delivered to the obligee, and it is afterward put into his possession by a person who has no authority to deliver it, the obligee cannot maintain an action on the instrument; if the possession is secured wrongfully, accidentally, or inadvertently, the instrument will be held never to have taken effect."

And on page 18, of the same Volume, it is stated:

> "Every bond, in order that it may be a binding obligation, must not only be executed and delivered by the obligor, but must also be accepted by the obligee. If, for any reason, an obligee in a bond refuses to accept it, the bond does not become operative, and no liability on the part of the maker thereunder arises. *Statutory or official bonds made payable to the state cannot become effective until they are accepted by those duly authorized to accept them.*" (Italics ours).

The plaintiffs were required to plead and prove the bond

was delivered by the defendant, or some other agent, and that the same was received and accepted by those duly authorized to receive and accept the same, prior to their doing business, under which liability is claimed, and unless they did so there was no cause of action stated. A bond of the character herein sued upon is only liable for acts occurring after the conditions precedent under the Statute, such as the issuance of a permit, etc., have been fulfilled. In the case of State vs. Diebert (So. Dak.) 240 N.W. 332, grain had been delivered to a warehouse prior to the time a permit to operate a public warehouse had been executed by the Department. Receipts were given for the grain, but not regular warehouse receipts. Subsequently a permit was issued by the Department and the warehousemen then issued regular warehouse receipts to the owners of the grain. It appeared that the grain had disappeared from the warehouse prior to the time the permit was issued and the owners of the grain brought suit in the name of the State on the bond and recovered in the lower Court. The Supreme Court of South Dakota reversed the case and held that the bond was only liable for acts occurring after the issuance of the permit.

Another case which is helpful on the question herein considered is American Surety Company vs. State (Tex.) 277 S.W. 790. See also 67 Corpus Juris, page 461.

Of course, the argument above raised for the first time on demurrer, and later at beginning of the trial, arises all through the case and will be covered more fully by subsequent discussions herein.

C. ERROR OF COURT STRIKING APPELLANT'S AFFIRMATIVE DEFENSE.

Specification of Error No. IV.
Specification of Error No. X.
Specification of Error No. XI.
Specification of Error No. XII.

The lower Court, by its order of December 30th, 1935, (Tr. 106) ordered its affirmative defenses stricken as not constituting defenses to the amended complaint (Tr. 88-101), and subsequently sustained objections which tended to prove them,—thus we are discussing here the cause, being Specification of Error IV (Tr. 266) and part of the effect, (Specifications of Error X, XI and XII, Tr. 270, 271 and 272).

The defenses set up the history of the bonds, the purpose for which given, to-wit, to qualify Chatterton & Son to do business as public warehousemen in the State of Montana under the Statutes of that State. The failure in delivery of said bond, licensing Chatterton & Son, and general failure of conditions precedent to making it a valid obligation, either in law or equity.

The Court allowed R. J. Healow, Agent for Chatterton & Son, a witness for plaintiff below, to testify as follows:

> "A bond was obtained for this warehouse conducted here by me. Soon after I became manager over here, I asked the Lansing office to procure a bond for the protection of the growers. That would be in the fall of 1929. The bond was issued in the early winter of 1930, about January. Plaintiff's "Exhibit 2" is the bond I now refer to. After taking the managership, I requested the Lansing office to procure a bond. *I had for years previously always operated under a bond, and they replied that they would get it.* That

was the last I heard of it for a long time. Of course, in discussing with them many times from Kansas City and occasionally from Michigan, they maintained that they would or did secure a bond as requested.

The bond came into my possession here at the Billings office some time during the winter or spring of 1930. That bond ran to July, 1930. Plaintiff's "Exhibit 3", which purports to be a continuation certificate of the same bonding company, continuing that bond in force for a year from July 1930 to July 1931, came into my possession shortly after the date that it bears, July 30.

Neither of these instruments was promptly filed with the Commissioner of Agriculture. The only explanation I have for this is that the bonding and business of that nature was conducted from the Lansing office, and I do not recollect of having any reason for them being returned to our office here." (Tr. 131). (Italics ours).

Then the Court, giving as a reason that the matter was previously stricken from the answer, refused to allow Appellant to go into the same matter allowed on direct, when said witness for plaintiff said, "I had for years previously always operated under a bond," and show how and for what purpose he had always gotten said bonds and why he had asked for this one, namely, to qualify as a licensed warehouseman under the laws of the State of Montana.

We believe it was vital to our case to show that he was an experienced man in qualifying under the State laws, that when he first came to Montana he so intended, but when he found *bean warehouses* did not have to come under the confining influences of the Department of Agriculture and State of Montana, he merely tucked the bond

away in his files and decided to forget about it, as is shown by his replies to the Department (Defendant's Exhibits 19 and 20) (Tr. 146 and 148) to inquiries from said Department (Defendant's Exhibits 21 and 22) (Tr. 149 and 150).

Appellant feels that under its pleading and proof it was entitled to show that from wording and intent this bond was a statutory bond. Counsel for plaintiff, we believe, were in the position where they had to concede that, unless the bond could be construed as a common-law-bond, they had no standing in Court.

Why then, should the Court arbitrarily hold at the outset that the obligation was a common-law undertaking and deprive the Appellant of its right to defend?

D. ADMISSION OF STATEMENTS MADE BY AGENT OF CHATTERTON & SON.

Specifications of Error Nos. VIII, IX, XIV, XV and XVI.

Because of their interrelation, the above specifications are taken together.

Under the theory that the bond was a common-law bond, and to attempt to show consideration, the lower Court allowed plaintiffs' witness, Healow, below, to testify that he represented by statements to bean depositors that they were bonded warehousemen (Tr. 269-270). There was no attempt to show that these statements were ever made in the presence of or communicated to the defendant.

Chatterton & Sons were not parties to this suit, and what their agents said or did was clearly hearsay as far as this Appellant was concerned.

The Court, however, repeatedly failed to allow Appellant to bring out from this witness, as shown above, the fact

that Healow knew what a bonded warehouse meant and knew at this very time that they were not bonded, that he failed to file the bond or comply with the Statute of the State when he, from long experience, knew otherwise and was, at the very time, acting in disregard of the rights of everyone concerned.

The above was followed, however, by allowing certain bean depositors, over objection of Appellant, to testify that they acted on such representation and that is why they so deposited the beans.

Still mindful of the rules of evidence in an action tried to the Court, we submit that we do not know how the Court came to its conclusions, except on objectionable testimony.

E. FINDINGS AND CONCLUSIONS OF COURT.

Specifications of Error Nos. XXVI to XLIII, inclusive.

Appellant believes that Appellant's motion to dismiss at the close of the case and objections to findings and conclusions of the Court may more properly be taken up here together.

H. E. Chatterton, President of Chatterton & Son, the principal, testified, "Whenever the States did require bonds, we took them out", (Tr. 200) and when Healow took charge of the Billings branch of that company, he assumed a bond was required by the State of Montana and proceeded to get one (Tr. 131).

H. E. Chatterton, back at Lansing, made application to Appellant's agents for a public warehouseman's bond to qualify in Montana; Austin Jenison, agent for Appellant at Lansing, Michigan, testified he did not know the opera-

tions were limited to "beans" in Montana and assumed they handled "grain", and there was no mistake on his part in the form of bond applied for or executed. This positive testimony is not contradicted, except inferentially where H. E. Chatterton testified as to the close friendship existing between the officers of his company and Mr. Jenison, from which association, social and business, he concludes Mr. Jenison must have known of their general business in Montana and elsewhere (Tr. 190-191).

It is apparent from the evidence that Healow subsequently determined the bean storage business did not come under the jurisdiction of the State (Tr. 146) and did nothing further to become licensed as a public warehouse.

Appellees contend that a bond or undertaking of this kind should be construed most strongly against the Appellant, but this Honorable Court has held otherwise and said *same must be strictly construed in favor of the obligors* in the case of McGrath vs. Nolan (Circuit Court, 9th Circuit, May 5, 1936) 83 Fed. (2d) 746, where the Court, on 751, said:

> "Here is an ambiguity which must be resolved in favor of the surety in keeping with the rule that surety contracts, particularly those required by statute, are to be strictly construed in favor of the obligors. Leggett v. Humphreys, 21 How. 66, 75, 16 L. Ed. 50; Commercial Nat. Bank of Washington v. London & Lancashire Indemnity Co., 56 App. D.C. 76, 10 F. (2d) 641, 642; Moody v. McGee (C.C.A.) 41 F. (2d) 515; State ex rel. Hagquist v. United States Fidelity & Guaranty Co., 125 Or. 13, 21, 265 P. 775."

The lower Court has in its final decision attempted to take a dual position—to uphold it partially as a valid statu-

tory obligation and, on the other hand, reform it and construe it aside from statutory provisions as a common-law undertaking. It can't be both—and any attempt to construe it as *a valid private agreement between the parties to this suit* is, to say the least, strained.

The undertaking was not given in pursuance *of any agreement between the parties, but simply to secure a statutory privilege.* It did not have that effect and was therefore wholly without consideration and void and could not be valid as a common-law undertaking.

Powers vs. Chabot, (Cal.) 28 Pac. 1070;
See also—National Surety Co. vs. Craig, (Okla.) 220 Pac. 943;
Halsted vs. First Sav. Bank, (Cal.) 160 Pac. 1075.

A bond, given as a statutory bond, cannot be considered as a common-law obligation.

Republic Iron & Steel Co. vs. Patillo (Cal.) 125 Pac. 923.

It is contended that the bond in question may be considered as a voluntary common-law bond, given without any reference to the Statute. Whether, in any case, it could be supposed that a sane man, not fearing the compulsion of the Statute, would voluntarily give such a bond as is described in Section 1203, running to nobody and enforceable by anybody who, in the future, could bring himself within its range, is a question not here presented. In the case at bar, it is expressly stated on the face of the bond that it is given in compliance with Section 1203.

Shaugnnessy vs. American Surety Co., 71 Pac. 701.

The salient points of this case, and the ones that Appellant believes are decisive, are:

(I) That said bond in controversy was executed with intent to and did cover the storage and handling of grain, as distinguished from beans.

(II) That said bond was intended as a statutory bond and contemplated the filing and approval of said bond and the licensing and supervision of Chatterton & Son by the State of Montana, and the facts disclose that said bond was not approved or filed and said Chatterton & Son never licensed by the State of Montana, nor any Department thereof.

(III) That there exists no basis for a reformation of said bond under the law or facts.

(IV) That there exists no basis whatever for the plaintiff making claim under said bond.

(V) No date of conversion of the beans has been fixed within the effective date of the undertaking.

BOND COVERS PUBLIC WAREHOUSEMEN IN STATE OF MONTANA TO INDEMNIFY THE OWNERS OF GRAIN STORED IN WAREHOUSE.

We do not believe that the following facts can be disputed in this case:

(A) That the application made by Chatterton & Son and signed by the officers in Lansing, Michigan, was for a "Public Warehousemen's Bond" to State of Montana.

(B) That the bond written, by its terms, was a Public Warehouseman's Bond to indemnify the owners of *grain* stored in said warehouse.

(C) That said bond was to qualify them as public warehousemen under the law of Montana and that the Commis-

sioner of Agriculture never licensed Chatterton & Son as warehousemen in the State of Montana.

(D) That said bond was never filed with the State and came into their possession a year after it expired by its terms.

(E) That the renewal certificate was never filed and came into possession of the Department of Agriculture about July 21st, or twenty-one days after it expired by its terms, and after the loss of beans occurred.

The Montana statute, Section 3574 Revised Codes of 1921, uses the language:

> "The term 'public warehouse' includes any elevator, mill, warehouse or structure in which grain is received from the public for storage, shipment or handling, whenever such grain is carried or intended to be carried to or from such warehouse, elevator, mill or structure by common carrier."

This Section was amended by the Laws of 1929, page 304, to read:

> "Section 3574. Whenever the word 'grain' is mentioned in this Act, it shall be construed to include flax. The term 'public warehouse' includes any elevator, mill, warehouse or structure in which grain is received from the public for storage, shipment or handling, whenever such grain is carried or intended to be carried to or from such warehouse, elevator, mill or structure by common carrier."

Section 3589 of the Codes of 1921 provides for the giving of bond by persons operating a public warehouse subject to the Act. The Act referred to is Chapter 216 of the Session Laws of 1921, in which this grain warehouse legislation first appears. (Appendix, Page ٤٥..).

Chapter 12 of the Laws of 1913, found as Section 3591 of the Codes of 1921, deals with "agricultural seeds", defining them. It makes no reference whatever to public warehouse. (Appendix, Page 8..).

Chapter 50 of the Session Laws of 1927 is the first time the warehousing of agricultural seed is dealt with, and there, in Section 4, the term "agricultural seed" is re-defined, in effect amending Section 3593 of the Codes of 1921, and this is added to the definition:

> "beans, peas and registered or certified seed grains in bags."

And by Section 8 of the Act of 1927 it is provided:

> "None of the provisions of this Act shall be construed as requiring an additional license from a public warehouseman or other person, corporation or association who is licensed to handle or store grain, but if any person, firm, copartnership, corporation or association holding a license to handle or store grain shall also choose to engage in the business of storing any agricultural seed for the public it shall be necessary to furnish such additional bond as the Commissioner of Agriculture shall determine, and in the storage of such agricultural seed such person, firm, copartnership, corporation or association shall be subject to the terms and conditions of this Act."

In our humble opinion the Montana statutes distinguish between "grain" and "beans", and that this bond here in question by its terms is to "indemnify the owners of grain stored in said warehouse", and that the storing of beans, as agricultural seed or otherwise, is not within the contemplation of this bond construed in the light of the Montana statutes.

Additionally, the bond runs to the State of Montana.

The State of Montana has suffered no loss. The State of Montana has no right to assert a loss on behalf of its citizens, except as provided by law. The law provides for the bonding of such warehousemen as the State licenses, and we think it is a condition precedent to the State's right to sue on the bond that the bond be given in connection with a license issued by the State. The bondsmen entered into the contract contemplating State license and supervision, and we don't think the State can omit or fail to license or supervise and then claim under the bond.

For the Court to construe the bond in such a manner as to hold the defendant responsible, regardless of the failure to license or supervise said Chatterton & Son, according to the intent and terms of the bond, is to enlarge the responsibility and liability under this bond far beyond the intent of same.

Counsel for plaintiff practically abandoned any hope of recovery on this bond, except that the same be construed as a common law bond. To do this, of course, means that he asked the Court to make a new contract for the sureties and change the character of the contract and increase their liability. The Court, in the case of Conant vs. Newton, 126 Mass. at 110, said:

> "In order to hold the defendants liable as on a bond at common law, we must treat this bond as if its condition was solely that Sanderson should faithfully manage and pay over the estate in his hands to the person entitled to it. But this was not the obligation which the defendants intended or consented to assume. They intended to become liable as sureties for one who was under the jurisdiction of the Probate Court, and who in administering the estate must conform to the

rules and practice of that Court. To hold them bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of the Probate Court would be to change the character of their contract and to increase their liability."

In the case of Kuhl vs. Chamberlain, similar to the one herein, 118 N.W. 776, at 777 and 778, the Court said:

"1. Counsel for plaintiff frankly concede that, unless this bond can be construed as a common-law bond, and not as a statutory bond, they have no standing in Court. They concede that, if the bond is to be deemed a statutory bond, defendants' contention must prevail. They argue, however, that it is not a statutory bond; that it does not purport to be such; that there is no such office as county depository, and the reference thereto contained in the bond must be deemed nugatory, and the bond must be enforced according to its plain terms in other respects; that the plaintiff is the obligee in the bond, and on the faith of it he deposited moneys with the Exchange Bank; and that he is now personally entitled to the indemnity provided for."

****

"It is alleged in the argument that the sureties were in no manner hurt by treating the bond as a common-law bond rather than a statutory bond, and that their undertaking was the same in either case, in that they would have been liable for just as much under a statutory bond as on a common-law bond. If this were so, it would not authorize the Court to make a new contract for the surety. Nor are we ready to assent to the ground of the argument. As a statutory bond, the maximum limit of liability of the defendants would be $2,000. Without discussing the question of whether the sureties had a right to be influenced in lending their suretyship by the supposed fact that the

> Board of Supervisors would permit only solvent banks to be selected, *there is much to be said for the proposition that a surety might rely upon the judgment of the Board of Supervisors in such cases.''* (Italics ours).

It is apparent from a reading of these authorities that sureties have a right, in writing a bond of the character herein, to rely on the conditions upon which the bond was executed, to-wit, that it was to authorize them to do business in the State of Montana as public warehousemen, which bond was to be filed with the proper authorities, and that it contemplated licensing and supervision of said Chatterton & Son, which would certainly be a different proposition than agreeing to pay the private debts of Chatterton & Son. The Court will note from the pleadings of plaintiff herein that they allege specifically that *neither Chatterton & Son or Chatterton & Son, Inc.,* ever qualified to do business in the State of Montana as a corporation or otherwise, much less licensed to do business as public warehousemen in said State.

Since this contract is restricted in its terms and on its face as a contract to the State of Montana for a certain purpose and on certain conditions precedent, this cannot be construed by the Court as a common-law obligation or a voluntary bond of any character. (13 C. J., 524).

> ''Restriction to Terms of Contract. The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where un-ambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used. When a written contract is clear and unequivocal, its

meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.

Court cannot make new contract. It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the court cannot supply material stipulations or read into the contract words which it does not contain."

BOND

TO THE STATE OF MONTANA.

This bond ran to the State of Montana for a certain purpose and delivery and acceptance was necessary to its validity.

Stearns on Suretyship (3rd Edition) page 194, has this to say:

"123. Delivery and acceptance are necessary to the Validity of a Bond.

A bond cannot take effect until delivered and accepted by the obligee. To constitute a delivery there must either be an actual manual passing of the instrument to the obligee, or to someone authorized to receive it for him, or such a disposition of it by the obligor as precludes him from further control over the bond. Such delivery must be without condition, and where a bond is put in possession of the obligee, with the stipulation it is not to take effect except upon condition, it does not become a legal delivery, and binding upon the surety, until such condition is fulfilled."

The bond herein, especially, comes within the above because it was delivered to the principal, Chatterton & Son, with the condition attached, expressed on its face, of the securing of a license to do business under the laws of Montana. *The bond was conditionally executed,* which condition was *shown on the face.* (Dair vs. United States, 16 Wall 1, 21 L. Ed. 491).

And on the question of consideration, the bond was executed dependent upon the matter of becoming a licensed warehouseman in and under the State of Montana—one depended on the other.

Stearns on Suretyship, page 198.

> "The main contract which the bond secures furnishes a consideration for the bond, where the one depends upon the other, such as where the obligee agrees to make a contract with the principal upon the condiiton that the latter will furnish a bond, or where a contract of employment is tendered upon the condition that the employee will give a bond."

In Keith County vs. Ogalalla Power & Irrigation Co., 89 N.W. page 375, the Court said:

> "The bond in suit was given to secure full performance of that contract. The lower court held — we think, correctly—that the contract was invalid, and not binding upon the precinct, and hence that the bond was without consideration, and unenforceable. While at common law a bond was a formal contract, requiring no consideration, there can be no question that our statute abolishing private seals has reduced it to the level of all other agreements, and made it a simple contract. Luce v. Foster, 42 Neb. 818, 60 N. W. 1027. Where a bond is given to secure performance of a contract, the entering into such contract by the obligee is

obviously its consideration, and, if the contract made is not binding upon the obligee, and he has done nothing of any legal validity or effect, the bond must fail."

In 9 Corpus Juris, at page 16, it is stated:

"As a general rule, a bond is not perfected until delivery thereof, and therefore delivery is essential to its validity, and it takes effect from that date. But in case of a statutory bond, the approval and filing takes the place of delivery."

In this case the bond was for the purpose of securing a license to do business, and was one of the requisites to doing business in the State, and when plaintiffs set forth that Chatterton & Son never qualified to do business in the State, plaintiffs are correct in that Chatterton & Son never filed their bond and were never licensed to do business as bean warehousemen, grain warehousemen, or public warehousemen of any kind or character. Plaintiffs attempt to show that the bond finally came into the hands of the Department of Agriculture, Labor and Industry, of the State of Montana, but that only after it and the renewal had expired and the loss had already occurred and Chatterton & Son were out of business and Healow had been discharged.

In 9 Corpus Juris, at page 17, it is stated:

"A bond must be delivered by the party whose bond it is, or by his agent or attorney. Where a bond is signed and sealed but not delivered to the obligee, and it is afterward put into his possession by a person who has no authority to deliver it, the obligee cannot maintain an action on the instrument; if the possession is secured wrongfully, accidentally, or inadvertently, the instrument will be held never to have taken effect."

And on page 18, of the same Volume, it is stated:

"Every bond, in order that it may be a binding obligation, must not only be executed and delivered by the obligor, but must also be accepted by the obligee. If, for any reason, an obligee in a bond refuses to accept it the bond does not become operative, and no liability on the part of the maker thereunder arises.

Statutory or official bonds made payable to the state cannot become effective until they are accepted by those duly authorized to accept them." (Italics ours).

The plaintiffs were required to prove the bond was delivered by the defendant, or some other agent, and that the same was received and accepted by those duly authorized to receive and accept the same, prior to their doing business, under which liability is claimed. A bond of the character herein sued upon is only liable for acts occurring after the conditions precedent under the Statute, such as the issuance of a permit, etc., have been fulfilled. In the case of State vs. Diebert (So. Dak.) 240 N.W. 332, grain had been delivered to a warehouse prior to the time a permit to operate a public warehouse had been executed by the Department. Receipts were given for the grain, but not regular warehouse receipts. Subsequently a permit was issued by the Department and the warehousemen then issued regular warehouse receipts to the owners of the grain. It appeared that the grain had disappeared from the warehouse prior to the time the permit was issued and the owners of the grain brought suit in the name of the State on the bond and recovered in the Lower Court. The Supreme Court of South Dakota reversed the case and held that the bond was only liable for acts occurring after the issuance of the permit.

Another case which is helpful on the question herein considered is American Surety Company vs. State (Tex.) 277 S.W. 790. See also 67 Corpus Juris, page 461.

RIGHTS OF PARTIES

As we have shown before, the plaintiffs below relied on the matter of a common-law or voluntary obligation, and we have previously shown that there is no such right in a bond of this character, and certainly the State of Montana only has a right to pursue its remedy under the Statutes of the State of Montana, and in this case the right only arises by reason of the same being construed as a statutory bond. Plaintiffs below also contended that they were entitled to reform this contract on the ground of mistake, but this is not true because of the fact that there could not have been any mistake between the State of Montana and the bonding company because at the time that the bond was entered into the law relating to grain warehousemen, hereinbefore quoted, was the only Act under which they had authority to license a warehouseman in and for the handling of grain, and it was not until after this case arose that counsel for these plaintiffs was responsible for passing a later Act, giving the State authority to bond bean warehousemen, to-wit, Chapter 55 of the Session Laws of the 23rd Session of the State of Montana, 1933, designated as "An Act Regulating the Business of Warehousing or Storing Beans", which was again changed or amended by Chapter 164 of the Session Laws of the State of Montana, 1935.

Although it is sometimes held that those in privity with the contracting parties have the right to ask for reforma-

tion, there are no grounds for reformation in this case, either in law or in fact. The facts are, as we have previously shown, that there was no mistake and that this bond was written on a blank form which had been furnished by the Department of Agriculture, and was executed by the defendant because of the fact that they thought that was the form of bond needed, and that they knew that, in the East, Chatterton & Son handled grain, and that it was necessary for them to have a bond to handle the same commodity in the State of Montana.

If there was any mistake, it was a mistake between Chatterton & Son, as principal, and the defendant, and it has been shown that Chatterton & Son made application for a public warehouseman's bond, which was the type that was written, so that, under any circumstances, it was a case of negligence on the part of said Chatterton & Son, and on the part of its agent, Healow, in not reading the contract when it was delivered, and this defendant should not be held responsible. As a matter of fact, negligence is a good defense against reformation. (53 C. J. 973).

Certainly, if any reformation was proper, at least the principal, Chatterton & Son, should have been joined as a party herein.

CONVERSION AND DAMAGES

Nowhere in this record is there any evidence of when the alleged conversion of the beans, for which loss damages is asked, except the expiration of the time limits in the bond.

The bond ran to July 1st, 1931. Healow testified that he was relieved of the management on July 2nd, 1931, and

the warehouse at Billings emptied of beans by July 13th, 1931, clear after the date of the bond limits. (Tr. 139).

It is shown that demand was made at Kansas City on Chatterton & Sons below, July 20th and 25th, 1931, for return of the beans. If this date fixes the conversion, then it was long after the bond had expired.

H. E. Chatterton, witness for the plaintiff, testified as follows:

> "Most of our warehouse receipts were issued in such a way that we did not agree to keep the identity of each different lot of beans intact. I know that after the failure, some shortage was found here at Billings, but I think that we had as many beans here as we had issued storage tickets for. I think that in June or July 1931 we had sufficient beans in this storage house to cover the storage receipts. That is, we meant to keep as many beans here as we had storage tickets for. That was our intention anyhow, and if they were not there, Mr. Healow had done that." (Tr. 202).

Healow testified:

> "As to what happened to the beans that were stored, from time to time certain lots of beans were ordered shipped to Kansas City by the Kansas City branch manager, and in response to those orders I shipped them from time to time. When I say "beans", I mean beans belonging to those various owners who had stored them. Usually consent was obtained from the growers before shipment. The manner in which consent would be obtained would be as follows: If we would be crowded for room over there, and we had a federal bonded warehouse at Kansas City and it was represented to them that they were just as safe there in a federal bonded warehouse as they were here, and there was no objection raised in some cases; but it was

> not the usual procedure to first go to the individual grower whose beans were being shipped out and obtain his consent." (Tr. 137).

and again:

> "I shipped beans out of this warehouse to the Kansas City plant and, when I did, I made the same arrangements with the holders of the warehouse receipts as if they were stored here; they were still their beans if they were not bought." (Tr. 154).

The report of Lindsay showed when shipments were made to Kansas City—during the period, but the testimony shows that beans were shipped there with the consent of the owners.

B. M. Harris, in his testimony, showed he found some of the beans at Kansas City and part hypothecated—but no date is fixed.

The record shows that the Billings warehouse was a branch of the Kansas City Department and beans from Billings were, from time to time, shipped there when they needed room. (Tr. 137).

No date is fixed when these beans were sold, stolen or hypothecated. Certainly it is incumbent for the Appellees to prove the loss or conversion and the time thereof.

In the California case of Palmer vs. Continental Casualty Co., 269 Pac. 638, the Court, in his connection, said, at page 639:

> "The evidence does not show what day in March it was that plaintiff called at McCartney's office. It was conceded that it was after March 6th. Appellant, in her briefs filed herein, claims that it was on the 28th of March. Assuming this to be the fact, although we find no evidence to that effect, we fail to

see how plaintiff has made out her case against the bonding company. The burden was upon her to establish the fact that McCartney misappropriated the money during the time the bond was effective. There is not a scintilla of evidence in the record to show the time when McCartney made this misappropriation. Appellant claims that he did not abscond until after the 6th day of March, 1924; that this fact is some evidence that he misappropriated the money subsequent to that date. This claim cannot be sustained. His absconding may have been the result of his embezzlement, but that fact offers no proof whatever as to when the embezzlement occurred. Appellant has failed to show any right to recover on the bond, and, for this reason, the judgment must stand."

It is fundamental that damage is based on the date of conversion. Sometimes it is fixed at the highest price between the date of demand and date of conversion, but there must be a date of conversion to fix the amount of the damages.

In the case of State vs. Broadwater, 61 Mont. 215, 201 Pac. 687, the Court, at p. 231, says:

"The precise date of this conversion is difficult to fix. It appears from the evidence that the defendant company disposed of all of its holdings, including its elevators, at a date not later than May 10, 1916.

It is stated as a general rule that 'Ordinarily, the date of demand and refusal is the date of the conversion. If an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event.' (38 Cyc. 2032, and note 74).

The trial court fixed June 1st as the date of conversion as to the Crowley and D'Arcy interests, and it appears that the demand and refusal of the Farms Com-

pany interest was August 2, 1916. For the purpose of this decision, these dates will be considered as the dates of the conversion."

We submit that there is not one scintilla of evidence to fix a date of conversion during the effective date of the bond.

AMOUNT OF JUDGMENT.

Specification of Error No. XLIV.

The amount of the bond herein sued upon is $10,000.00 (Tr. 13). The Court gave judgment for $13,100.00, with interest at 6% from July 15th, 1931.

We submit that, under no theory of law that we know of, is Appellant liable for more than the damages or loss up to but not exceeding the sum of $10,000.00, with interest from a fixed date when Appellant became liable to pay said sum.

9 C. J. 131 Sec. 243,
4 R. C. L. 68 Sec. 35.

V. CONCLUSION.

It has always been plain to the Appellant that the bond sued on herein was given to secure the statutory privilege of operating a warehouse in the State of Montana. The bond was not filed and no license was issued. There was no agreement between the Appellant, Fidelity and Deposit Company of Maryland, and the growers that any bond would be given, nor was there any agreement between the Fidelity and Deposit Company of Maryland and the State of Montana that said bond would be given.

The only excuse for reforming said bond, in our opinion, was that it was a statutory bond and was intended to comply with the Statute regulating the business of a bean

warehouseman. The Court reforms the bond to comply with a statutory bond for a bean warehouse, although there is a statutory grain warehouseman's bond provided for, and this particular bond was written on a printed form furnished by the said State of Montana.

The Court, however, after reforming this bond to apparently comply with a Statute for a bean warehouseman's bond (although said bean warehouseman's Act was not on the Statute books of the State of Montana until some three years after this action was brought), then holds that the liability is not statutory, but is a common-law liability. To arrive at this final conclusion, the Court went on the theory that a contract was entered into between the surety and his principal for the benefit of the growers, and that said contract was completed and fully executed when the bond was delivered by the surety company to its principal, even though it is very clear that it was never the intention of either the surety or the principal that the bond should become effective unless it was filed with the State in connection with the application for a license as a warehouseman handling grain and such license was issued. If we were to suppose that, after this bond had been executed by the surety and had been delivered to the principal, the application by Chatterton & Son for a warehouseman's license had been made and the bond tendered, but the license had been denied, certainly under such circumstances the fact that the warehousemen went ahead and violated the law and operated the warehouse without a license would not make the surety liable on a bond which was intended to become effective only in case a license was

issued. It seems to Appellant that there never was an executed contract until that contract was accepted by the State, who was the obligee named in the bond, and its acceptance evidenced by its issuance of the license in connection with which the bond was written.

We also submit that the total failure of the proof, even as to fixing the date of the conversion or loss and subsequent damages, was such that the plaintiff below should not have prevailed.

Respectfully submitted,

T. B. WEIR,

W. L. CLIFT,

HARRY P. BENNETT,

Helena, Montana,

Attorneys for Appellant.

Appendix

Sections of the Statutes of the Laws of the State of Montana, Involved Herein.

3573. The division of grain standards and marketing. The department of agriculture, labor and industry, through the division of grain standards and marketing, shall enforce all the laws of the state of Montana concerning the handling, weighing, grading, inspection, storage and marketing of grain, and the management of public warehouses.

3574. Definitions. Whenever the word "grain" is mentioned in this act, it shall be construed to include flax. The term "public warehouse" includes any elevator, mill, warehouse, or structure in which grain is received from the public for storage, milling, shipment or handling. The term "public warehouseman" shall be held to mean and include every person, association, firm and corporation owning, controlling, or operating any public warehouse in which grain is stored or handled in such a manner that the grain of various owners is mixed together, and the identity of the different lots or parcels is not preserved. The term "grain dealer" shall be held to mean and include every person, firm, association and corporation owning, controlling, or operating a warehouse, other than a public warehouse, and engaged in the business of buying grain for shipment or milling. The term "track buyer" shall mean and include every person, firm, association, and corporation who engages in the business of buying grain for shipment or milling, and who does not own, control, or operate a warehouse or public warehouse. The terms "agent," "broker," and "commission man" shall mean

and include every person, association, firm and corporation who engages in the business of negotiating sales or contracts for grain or of making sales or purchases for a commission.

3575.1 State scale expert - appointment - bond - deputy's bond - duties. ******

3575.2. Fees for scale inspection service. *****

3575.3. Payment of expenses of scale expert - contingent revolving fund. ****

3575.4. Certificate of test. *****

3575.5. Untested weighing devices not to be used - use of rejected devices forbidden. *****

3575.6. Permit to use weighing device until inspection. ******

3575.7. Penalty for making false test. *****

3575.8. Scale testing equipment to be transferred to department of agriculture. *****

3576. Appointment of chief inspector of grain, inspectors, samplers, weighers - qualifications of inspectors - interest in grain forbidden. *****

3577. Penalty for misconduct by inspectors, etc. *****

3578. Designation of inspection points - deputy inspectors. ******

3579. Charges of public warehousemen. Charges must be made by all public warehousemen subject to the provisions of this act, for the handling or storage of grain, as follows:

(a) Two cents per bushel for receiving, elevating, weighing, and immediate delivery on car of the identical grain without mixing. Immediate delivery - not less than

forty-eight hours but where conditions permit, special bin assemblage of grain without loss of identity for carload shipment shall be construed as immediate delivery, provided total period of assemblage and delivery does not exceed seventy-two hours. Provided in case said period is from seventy-two hours to one hundred and six hours, the entire charge shall be two and one-half cents per bushel, and from one hundred and six to one hundred and thirty hours, the charge shall be three cents per bushel. This rate for immediate delivery applies to all grain so delivered.

(b) Four cents per bushel for all grains except flax, for receiving, grading, weighing, elevating, insuring, fifteen days or part thereof free storage, and delivering to the owner. For flax this charge shall be five cents per bushel.

(c) Two cents per bushel for cleaning grain at request of owner where there are cleaning facilities, in which case screenings shall be delivered to owner.

(d) The charges for storage shall be: one-thirtieth of one cent per day per bushel for each day in storage after period of free storage has elapsed.

(e) Twenty-five per cent reduction from the above charges shall be allowed when the market price of wheat being sold at point of origin at time of sale is less than fifty cents per bushel.

Failure on the part of any public warehouseman to comply with the provisions of this act will render the licenses of such warehouseman subject to revocation and cancellation by the commissioner of agriculture.

3580. Establishment of standard grain grades - procedure. ******

3581. Fees for inspection and weighing. ******

3582. Records of weighing and grading - certificate. ******

3583. Removal of inspectors, samplers or weighers for misconduct. ******

3584. Appeals to commissioner of agriculture - hearing and order. ******

3585. Discrimination in charges by warehousemen prohibited. ******

3586. Duty of warehousemen to receive grain - warehouse receipt. Every public warehouseman shall receive for storage and shipment without discrimination of any kind, so far as the capacity of his warehouse will permit, all grain tendered him in the usual course of business in suitable conditions for storage. A warehouse receipt, in form prescribed by law and the rules and regulations of the commissioner of agriculture, shall be issued and delivered to the owner, or his representative, immediately upon receipt of such load or parcel of grain.

3587. Penalty for unlawful issue of warehouse receipt. It shall be unlawful for any public grain warehouseman to issue a receipt for grain, except on the actual delivery of the grain into the warehouse, or to issue a warehouse receipt for a greater amount of grain than that actually received.

Any person violating any of the provisions of this section, and any grain inspector knowingly permitting any grain to be delivered contrary to the provisions of this sec-

tion, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than thirty days nor more than six months.

3588. Regulation of sale and storage of grain - termination of storage contract - sale of grain for charges. ****

3588.1. Disposal of grain without notice to department of agriculture and compliance with law forbidden - delivery of grain for warehouse receipts. ****

3588.2. Possession by warehouseman considered bailment, when - prior right of warehouse receipt holder to grain. *****

3589. Annual report of warehouseman - special reports - penalty for failure to report - bond - license and fee - penalty for doing business without license. *****

3589.1. Protection of holders of warehouse receipts by intervention of department of agriculture - authority of department - action on bond - attorney general and county attorneys to assist. Whenever any warehouseman, grain dealer, track buyer, broker, agent or commission man is found to be in a position where he cannot, or where there is a probability that he will not meet in full all storage obligations or other obligations resulting from the delivery of grain, it shall be the duty of the department of agriculture, through the division of grain standards, to intervene in the interests of the holders of warehouse receipts or other evidences of delivery of grain for which payment has not been made, and the department of agriculture shall have authority to do any and all things lawful and needful

for the protection of the interests of the holders of warehouse receipts or other evidences of the delivery of grain for which payment has not been made, and when examination by the department of agriculture shall disclose that for any reason it is impossible for any warehouseman, grain dealer, track buyer, broker, agent or commission man to settle in full for all outstanding warehouse receipts or other evidence of delivery of grain for which payment has not been made, without having recourse upon the bond filed by said warehouseman, grain dealer, track buyer, broker, agent or commission man, it shall then be the duty of the department of agriculture for the use and benefit of holders of such unpaid warehouse receipts or other evidences of the delivery of grain for which payment has not been made, to demand payment of its undertaking by the surety upon the bond in such amount as may be necessary for full settlement of warehouse receipts or other evidences of delivery of grain for which payment has not been made. It shall be the duty of the attorney general or any county attorney of this state to represent the department of agriculture in any necessary action against such bond when facts constituting grounds for action are laid before him by the department of agriculture.

3590. Special inspection of grain. *****

3591. Sampling grain. *****

3592. Examination of grain cars at destination - license of grain weighers. *****

3592.1. License for seed warehouses. That all persons, firms, co-partnerships, corporations and associations operating any public warehouse or warehouses in this state

and which hold themselves out to the public as receiving agricultural seeds of any kind for storage for the public shall, on or before the first day of July of each year, pay to the state treasurer of Montana a license fee in the sum of fifteen dollars ($15.00) for each and every warehouse, elevator or other place owned, conducted or operated by such person or persons, firm, co-partnership, corporation or association wherein agricultural seed of any kind is received and stored, and upon the payment of such fee of fifteen dollars ($15.00) for each and every warehouse, elevator, or other place where agricultural seed is received and stored within the state of Montana, the commissioner of agriculture shall issue to such person or persons, firm, co-partnership, corporation or association a license to engage in the storing of agricultural seed at the place designated within the state of Montana, for a period of one year.

3592.2. Bond of seed warehousemen. Each such person, firm, co-partnership, corporation or association subject to the provisions of the act shall, on or before the first day of July of each year, give a bond with good and sufficient sureties to be approved by the commissioner of agriculture to the state of Montana, in such sum as the commissioner may require, conditioned upon the faithful performance of the acts and duties enjoined upon them by law. Any person, firm, association or corporation who shall commence the business aforesaid after the first day of July of any year shall be required to pay said license fee and furnish such bond before engaging in or carrying on any such business.

3592.3. Penalty for conducting business without license. Any person, firm, co-partnership, corporation or association who shall engage in or carry on any business or occupation for which a license is required by this act without first having procured a license therefor, or who shall continue to engage in or carry on any such business or occupation after such license has been revoked, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00), and each and every day that such business or occupation is so carried on or engaged in shall be a separate offense.

3592.4. Definition of "agricultural seeds." The term "agricultural seeds" as used in this act shall be held to mean and include the seeds of red clover, white clover, alsike, alfalfa, Kentucky bluegrass, timothy, brome grass, orchard-grass, redtop, meadow fescue, oatgrass, rye-grass, and other grasses and forage plants, corn, rape, buckwheat, beans, peas, and registered or certified seed grains in bags.

3592.5. Warehouseman to receive seed for storage without discrimination. *****

3592.6. Rules and regulations may be made by commissioner of agriculture - reports - form of warehouse receipts. *****

3592.7. Storage constitutes bailment. The storage of agricultural seed under the terms of this act shall constitute a bailment and not a sale and upon the return of the warehouse receipt to the proper warehouseman properly endorsed, and upon payment or tender of all advances and

legal charges the holder of such warehouse receipt shall be entitled to, and it shall be compulsory for the warehouseman to deliver to such owner and holder of the warehouse receipt, the identical agricultural seed so placed in said warehouse for storage.

3592.8. Additional bond required from grain warehousemen for seed storage. None of the provisions of this act shall be construed as requiring an additional license from a public warehouseman or other person, corporation or association, who is licensed to handle or store grain, but if any person, firm, co-partnership, corporation or association holding a license to handle or store grain shall also choose to engage in the business of storing any agricultural seed for the public it shall be necessary to furnish such additional bond as the commissioner of agriculture shall determine, and in the storage of such agricultural seed such person, firm, co-partnership, corporation or association shall be subject to the terms and conditions of this act.